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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 434

SUPERIOR ENGRAVING COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX.

PAGE

Jurisdiction 2

Opinions below 2

Statement 3

Questions presented 4

Specifications of errors to be urged..... 5

Reasons for granting writ..... 7

Conclusion 19

CITATIONS.

Cases.

Allis-Chalmers Manufacturing Co., In the Matter of, 50 N. L. R. B. 306.....4, 6, 13, 14

Carson, Pirie, Scott & Co., Matter of, 69 N. L. R. B. 935 12

Essential Tool & Die Corp., 12 W. L. R. 58..... 15

Franks Bros. v. N. L. R. B., 321 U. S. 702..... 9

Medo Photo Supply Corp. v. N. L. R. B., 321 U. S. 678 11

Montgomery Ward & Co., 13 W. L. R. 454..... 15

N. L. R. B. v. Fansteel Metallurgical Corporation, 306 U. S. 240.....9, 20

N. L. R. B. v. Mexia Textile Mills, 339 U. S. 563..... 9

N. L. R. B. v. The Pittsburgh Steamship Company, Docket 42 4

Southern Steamship Co. v. N. L. R. B., 316 U. S. 47.. 19

Superior Engraving Company, Matter of, 61 N. L. R. B. 40, 44.....8, 17

Superior Engraving Company, Matter of, 67 N. L. R. B. 938 13

Superior Engraving Co., 24 W. L. R. 351; 28 W. L. R. 863 15

Tabardrey Manufacturing Co., Matter of, 51 N. L. R. B. 246 10

Thornhill v. Alabama, 310 U. S. 88, 96..... 16

United States v. International Union, United Mine Workers of America, 77 F. Supp. 563, affirmed 177 F. 2d 29, cert. den. 338 U. S. 871..... 12

Wallace Corporation v. N. L. R. B., 323 U. S. 248..... 18

Statutes.

National Labor Relations Act (as amended), U. S. C. Title 29, Chapter 7.....2, 8, 10, 11, 15, 16, 17, 18

Miscellaneous.

H. Rep. No. 245 on H. R. 3020, 80th Congress.....10, 19

S. Min. Rep. No. 105, Pt. 2, on S. 1126, 80th Congress, page 11 10

12th Ann'l Report of N. L. R. B., p. 54..... 14

Executive Order No. 9328 of April 3, 1943..... 15

Joint Statement of Policy by W. L. B. and N. L. R. B., 14 N. L. R. viii..... 15

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To the Honorable Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the Final Order of September 20, 1950 (R. 86), of the Court of Appeals for the Seventh Circuit enforcing a decision and order of the National Labor Relations Board in the above entitled cause, numbered in said court as Cause No. 9920, and that upon issuance of the said writ and upon full review of the said Final Order this Court order reversal thereof.

I.

JURISDICTION.

This Court has jurisdiction under Section 10(e) and (f) of the Labor-Management Relations Act, 1947; U. S. C. Title 29, Par. 160 (e) and (f).

II.

OPINIONS BELOW.

The Intermediate Report of the Trial Examiner appears at R. 32, the Decision and Order of the National Labor Relations Board at R. 63.

The opinion of the Court, as modified on rehearing, is published in 173 F. 2d 783, and appears at R. 843 and R. 856.

III.

STATEMENT.

The basic facts are succinctly embraced in the Court of Appeals opinion, with the important exception that the union did not lose, nor is there any finding that it lost its majority by reason of "normal turn-over" as implied in the Court's opinion.

The Board order enforced by the Court was entered April 28, 1949, and commands petitioner to recognize as exclusive collective bargaining agent for its 77 employees, Chicago Photo-Engravers Union No. 5, which had been selected in a consent election October 11, 1943. There were then 36 individuals in the bargaining unit; only 10 of them remained at the time of the Final Order, none of whom is shown ever to have been a member of the union. Although the union and petitioner bargained in 1943, complete agreement was not reached; the contract dispute went to the War Labor Board and was not finally decided until the closing days of that agency in late 1945. The union has taken no steps since 1943, by the handling of grievances or otherwise, actually to represent the employees except to process the W. L. B. and this and a prior N. L. R. B. case. Petitioner concedes it has refused to bargain with the union since 1945 on the ground that the union had lost its majority by March, 1944, prior to the commission of the asserted unfair practices by petitioner, through a concerted transfer of 19 employees to competitive establishments in which the union held closed shop contracts. Numerous requests for another election in the intervening years by the employer and by subsequent employees have been denied by the Board.

IV.

QUESTIONS PRESENTED.[1]

1. Does the Labor Relations Act compel an employer to bargain with a union where it has lost its majority, not by reason of unfair practices by the employer, nor by "turnover," but by a concerted transfer of its members, with the union's consent, to other employers?

2. Does the Labor Board's so-called *Allis-Chalmers* doctrine, originally designed to forestall changes by employees in contractually established bargaining relationships during the pendency of War Labor Board proceedings, effectuate the purposes of the Labor Act to assure employees freedom to select their own representative or to select no representative, when it is extended to a case in which the union lost its majority status *before* such proceedings and in which, at the time of its application, there is an almost complete change in the constituency of the bargaining unit?

(a) Should a union which did not help to maintain a business at full efficiency during the war but sought to destroy it by endeavoring to have its accounts and key sales people solicited away by competitors while its members permanently, rather than temporarily as in an orthodox strike, withdrew their services, be the beneficiary of the *Allis-Chalmers* doctrine?

1. We do not list as a question presented by this petition the question as to whether the 1947 amendments to the Labor Act in conjunction with the Administrative Procedures Act enlarge the former scope of review. This is because we believe that question will be settled by decision of ***N. L. R. B.*** v. ***The Pittsburgh Steamship Company,*** Docket 42. If the decision therein be an affirmance of the views of the 6th Circuit, we would wish to urge that the Board's factual and credibility determinations at bar cannot stand.

3. Are declarations of union members made at the time they are transferring their employment admissible against their union to prove that the transfer was a union activity?

4. Where the Board is barred by the six months' statute of limitations in the Labor Act from issuing a complaint as to any specific asserted practice, may it nevertheless give relief against the practices of which it has no jurisdiction to complain?

5. Can the Board after having once prosecuted an unfair labor practice charge to a final order ending in unqualified dismissal of the complaint issued thereon, thereafter relitigate the same asserted conduct in a subsequent unfair practice proceeding and find the employer guilty?

V.

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In holding that the charging union was entitled to be the exclusive collective bargaining agent for 77 employees in a collective bargaining unit on the strength of a consent election held some six years previously where only 10 of the 77 employees had ever had an opportunity to vote either for or against the union and where the employees who originally voted for the union voluntarily and by concerted action withdrew from employment 3 and 4 months after the election.

2. In failing to hold that the rights of the union as an entity are controlled by the mass action of its members in transferring their employment to other employers.

3. In failing to hold that the unique measures of self-help resorted to by the union and its members, viz., an

attempted raid on the customers and the sales organization of the business and what in effect was a permanent "strike" by the members, were gross violations of the wartime program for the peaceful settlement of disputes and disqualified the union for *Allis-Chalmers* benefits.

4. In failing to hold that at the times petitioner is asserted not to have bargained the union was not bargaining in good faith and therefore could not command bargaining by petitioner.

5. In holding that declarations of union members made at the time they are transferring their employment are inadmissible as against their union.

6. In holding that where the Board is barred by the six months' limitation in the Act from issuing a complaint with respect to a certain matter, it nevertheless may grant relief thereon.

7. In failing to hold that much of the conduct complained of in the complaint herein is identical with that previously complained against petitioner in prior case decided in petitioners' favor, and in failing to hold that the Board is estopped to re-try the same charges of unfair practices.

8. In failing to set aside the Board's order.

VI.

REASONS FOR GRANTING WRIT.

1. For how long and in the face of what circumstances a Labor Board representation determination is binding upon an employer and upon employees who subsequently come into the bargaining unit, and under what circumstances a union, as an entity, is controlled by the concerted action of its members which destroys its majority status are, we submit, questions of national importance in the administration of the Labor-Management Relations Act.

None of the 77 employees presently[2] in the bargaining unit is shown ever to have been a member of the union; only 10 of them were in it at the time of the 1943 election. No employees are found to have left either the union or their employment with petitioner as the result of unfair labor practices. Enough employees (19) to destroy the union's majority quit their employment by March 1944, *before* petitioner is found *constructively* (by allegedly committing another unfair practice said to be barred by the Act's six month statute of limitations but nevertheless permitted to be the fulcrum for relief) to have refused to bargain.

This exodus, coincident with the union's campaign to "persuade" (R. 45) the company to accede to its closed shop demand before submission of the contract dispute to the War Labor Board, was contended by the company to have been ordered by the union officials. It was conceded by the Trial Examiner to have been "more than

2. We use the term "presently" as referring to the date of the Labor Board's final orders of April 28 and June 9, 1949, when the record now before the Court was closed.

coincidental" (R. 46); was "conclusively presumed" by the Board to be due to employer unfair practices, and obliquely concluded by the Court of Appeals to have been merely "a change of personnel occurring in the normal course of business" (R. 852). To this we take complete exception. The Labor Board made no such finding and the undisputed evidence is that the mass quitting was "unusual" (R. 177). Likewise it is undisputed that the course of the business in December 1943, and January and February 1944, was most abnormal. The Court of Appeals "normal turnover" rationalization thus is without foundation.[3]

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3. Genesis of the Court's error apparently is in a recital in the Intermediate Report that certain of the employees who were called as witnesses "testified * * * that they left for better paying jobs * * *" (R. 46). However, the Trial Examiner did not convert this recital of evidence into *a finding of fact* that this was the motivating factor in the transfers. On the contrary, implicit in his discussion is the unusualness of the phenomenon of 19 men, many with lengthy seniority, quitting their jobs soon after voting a union in and while the union was in a contract campaign. The Trial Examiner, *unable to make a finding that this was "normal turnover,"* expressed the view that since the union had been selected by the *election* process, evidence "of at *least equal force*," *i. e.*, an *election*, would be necessary to prove loss of majority *"even assuming that these separations were at the Union's direction"* (R. 46).

The Board did not make any finding of normal turnover but said that since the employer "committed unfair labor practices, however, at a time when the Union was the established bargaining representative of its employees, the Respondent is precluded from attributing the Union's alleged loss of majority to the Union's own actions, for under such circumstances the Union's alleged loss of majority is *conclusively presumed* to be due to the Respondent's unfair labor practices" (R. 67). The vices of this are first, as correctly held by the Court (R. 852), the Board cannot rely on "conclusive presumptions," but must adhere to evidence (Sec. 10b of the Act as amended); second, the asserted practices occurred *after* the loss of majority and therefore could not cause it; third, these asserted practices, i.e., disparaging the union and causing disavowal of it, had previously been litigated in Case 13-C-2281 and the complaint thereof in that case dismissed in a final order by the Board (R. 119).

The Court failed entirely to pass upon this phenomenon as "concerted activity" of the members with or without instigation of the union officials. It appears to have been convinced (rightly) that if the union officials had *ordered* the men to quit that the "union" thereafter could not assert it held the position of majority agent. (Petitioner's rejected proof would, we believe, have required such a holding.) But the legal question still remains—does not the same consequence flow from the concerted action of the members even if it be conceded that officials did not order it?

There is, we believe, no decided case like this in which the members, coincident with a campaign by the union to embarrass the employer's business, without sacrifice of their memberships, destroyed the union's majority in the particular establishment by transferring to competitive establishments. This, unlike other cases, is not a case of "defection" in union membership. It is a case of defection in employment.

Whether the employer after this permanent withdrawal of a majority was bound to bargain depends upon the interplay of *N. L. R. B.* v. *Fansteel Metallurgical Corporation*, 306 U. S. 240, *Franks Bros.* v. *N. L. R. B.*, 321 U. S. 702, and *N. L. R. B.* v. *Mexia Textile Mills*, 339 U. S. 563. *Fansteel* held that where the union's majority presumptively was destroyed by the discharge of "sitdowners," within a matter of days of reaching a majority the employer no longer had to bargain. *Franks* held that the Board had authority to require an employer to bargain with a union which had lost its majority *after* the company wrongfully had refused to bargain; that "a bargaining relationship once rightfully established must be permitted to exist and function for a *reasonable period* in which it can be given a fair chance to succeed." (Observe how the Board converts this into an inflexible "presumption of majority, *conclusive* during the year following certification." (R. 67, footnote 5.) *Mexia* held that an employer, which in

a refusal to bargain case offered no evidence of loss of majority status and failed to preserve its point to that effect before the Board, could not in a subsequent enforcement proceeding urge loss of majority.

Mexia is cited in the opinion at bar for the proposition that once a union has been certified by the Board (or selected through its consent procedure as here), the employer thereafter can never defend a refusal to bargain *complaint under Section 10* of the Act on the ground of loss of majority because the employer is not permitted in *representation proceedings under Section 9* to initiate a "decertification" petition. This construction of *Mexia* converts it into a holding that an employer is required to deal with a minority union as the exclusive agent of his employees. We contend *Mexia* stands for no such sweeping proposition and was not so intended by this Court.[4] But the Court of Ap-

4. The evil that Congress sought to cure by the 1947 amendment to Section 9 (c) giving employees the right to initiate "decertification" proceedings was that as the original act was applied by the Board employees had no means of ridding themselves of an unsatisfactory or a minority, but nevertheless employer recognized, union except by filing a petition to have some other union certified. (*In the Matter of Tabardrey Manufacturing Co.*, 51 N. L. R. B. 246; H. Rep. No. 245 on H. R. 3020, 80th Congress, p. 35.) It was only employees who needed the protection provided by this amendment to Section 9 because employers always had the right to free themselves from a non-majority union by simply refusing to bargain with it. (The employer, of course, is guilty of an unfair practice if the union in fact proves to be a majority agent.) All of this was recognized procedure while the 1947 amendments to the Act were being debated. Indeed the Minority Report of the Senate Labor Committee pointed out:

> "* * * where an employer doubts a union's majority status in good faith, he need only decline to bargain." (S. Min. Rep. No. 105, Pt. 2, on S. 1126, 80th Congress, page 11.)

The foregoing demonstrates that by granting employees the right to initiate decertification proceedings under Sec. 9 of the Act, it was not the intention of Congress to require employers to bargain with minority unions nor to deprive employers of the defense of no majority if they were proceeded against under Section 10 of the Act for an asserted unfair failure to bargain.

peals having given it that broad meaning, we submit that certiorari should be granted here to clarify the meaning of *Mexia* if for no other reason.

This case, therefore, presents a basic issue not heretofore passed on by this Court and involves interpretation of landmark decisions that are of recurrent importance to employers, employees, unions and the Board in determining the obligation of employers to bargain. Philosophically it involves the degree of accommodation that will be allowed between the priority privileges of unions as entities and the rights of individuals who subsequently come into bargaining units to choose their own representative or to exercise the right, guaranteed by Section 7 of the Act, "to refrain" from organization.

2. Involved in determination of the basic issue is the question as to whether the union, as an entity, has bargaining rights independent of and unaffected by the actions of its members in destroying its majority status. In the cases up to this time holding that a union which actually had lost a majority could nevertheless compel bargaining, the loss of majority has been attributable to the wrongful action of the employer who diluted the union membership ratio either by direct interference or by such "stalling" as to permit attrition by "turnover." (Cf. *Medo Photo Supply Corp.* v. *N. L. R. B.*, 321 U. S. 678.) In such situations the Board and the courts in effect have constructively placed the lost membership back into the union. The present case is utterly different. Although the employer lost employees, the union did not lose a single member — the members merely transferred their services to other employers with which the union enjoyed closed shop contracts.

The Board and the Court of Appeals have proceeded on the unstated premise that the union, as an entity, had bargaining rights which were unaffected by the action of the

members (*Matter of Carson, Pirie, Scott & Co.*, 69 N. L. R. B. 935, *contra*); that it was not sufficient to prove that concerted mass action by the members destroyed its majority; that the bargaining rights of the entity could be affected only by proof that union officials had formally ordered the transfer of members. Underlying the opinions is the notion that a union, as an entity, by virtue of certification acquires a novel variety of property right in gross in the representation of employees who from time to time may be in an establistment. This property concept is, we submit, antagonistic to the agency relationship between employees and their representatives which it is the purpose of the Act to protect. The Court of Appeals decision, therefore, that the agent is not bound by the acts of the principal involves a fundamental departure from the philosophy of *United States* v. *International Union United Mine Workers of America*, 77 F. Supp. 563, affirmed 177 F. 2d 29, cert. den. 338 U. S. 871, "that as long as a union is functioning as a union it must be held responsible for the mass action of its members." That case and this cannot stand together.

The doctrine, implicit in the instant opinion, that a union as an entity can suffer penalties or losses only through the action of its officers and not through the mass action of its members (as distinguished from isolated actions of a few of them) is unsound legally and is an invitation to mass irresponsibility. If certiorari be denied here, this mischievous doctrine will grow until some time in a case perhaps having tragic consequences to the participants this Court strikes it down.

We suggest that it is in the public interest that this doctrine insulating a union from the mass action of its members not be fertilized by denial of certiorari; that it is fortunate that the doctrine arises in a case in which nega-

tion of it will bring actual harm to no one and operate only to permit 77 individuals to select a union if they wish, or to select none.[5]

3. The validity of, and the limitations upon the Board's so-called *Allis-Chalmers* (50 N. L. R. B. 306) doctrine, which denied employees the right to change bargaining representatives and "stabilized" contractually recognized bargaining relationships during pendency of War Labor Board proceedings, which is greatly extended in the case at bar, have never been determined by this Court.

In view of current grave possibilities for the necessary establishment of a somewhat similar disputes-settling agency, the involvement of this doctrine presents a public question of more than academic interest:

The *Allis-Chalmers* doctrine was formulated "to protect the bargaining rights of a union which had voluntarily accepted the orderly procedures provided for the peaceful settlement of wartime labor disputes and which had thus been compelled to suspend its normal bargaining functions

5. The statement at the conclusion of the Court's opinion (R. 854) that the Board's order is not a permanent one and that should the employees "after the Union has been given a reasonable time in which to succeed" be dissatisfied they can file a decertification petition provides but illusory comfort. Laying aside technicalities common sense dictates that six years is long enough for any union to succeed if it really has members. However to all of the presently elapsed time must be added an additional seven months if certiorari be denied because it is the Board's theory that the union was and is entitled to one full year's recognition, *plus* all time before the W. L. B. and all time in which there were "unremedied" unfair practices. Thus if the order be enforced the Board will not entertain a "decertification" petition for some seven months. In the meantime the employees will have impressed on them, whether they will or no, a bargaining agent they are not shown to have the faintest connection with, and petitioner must recognize it as their exclusive agent. This is precisely what the Board has held in the intermediate representation petitions involving these parties. (*In the Matter of Superior Engraving Company*, 67 N. L. R. B. 938.)

["self-help"] during a period beyond its control" (12th Ann'l Report of N. L. R. B., p. 54). If a union struck or otherwise interrupted production instead of following War Labor Board procedures, it could not claim the benefit of *Allis-Chalmers*.

What admittedly occurred here, by concerted action of the members was, during the time the members remained employees, a slow-down and a refusal to work overtime; simultaneously the union officers endeavored to have petitioner's accounts and sales force enticed away; finally, came the mass transfer of members which differed from an orthodox strike only in that it was more severe by reason of being a permanent, rather than a temporary, interruption of relationships. It is true, as pointed out in the opinions below, that the slow-down and the refusal to work overtime ended before submission of the dispute to W. L. B. This was a necessary consequence of the withdrawal of the members; no longer being employees, they no longer could slow down. The termination of the slow-down and of the overtime refusals rather than reflecting credit on the union, serves only to illuminate its complete or virtual non-existence in what remained of the bargaining unit.

Public interest is not served, nor is the nation better prepared for future conditions of emergency by glossing over such concerted activities[6] and treating them as the equiva-

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6. The full power of the union's battle plan resulted from the following unusual combination of circumstances:

(1) An employer that did not resist the union but cooperated in a consent election and thereafter promptly bargained in good faith but refused to concede a closed shop, although it offered union security in the form of maintenance of membership;

(2) A union that through the closed shop in virtually the remainder of the industry in the area and through contracts that required that hiring by the other employers be through the union, controlled virtually all of the available jobs;

(3) The wartime labor shortage with the accompanying factor that photo-engravers, being non-essential, were in exceptionally

lent of bona fide renouncement of self-help and acceptance of government approved methods of settling disputes during a national emergency.

4. Involved also is the construction to be given to the 1947 amendment of Section 10(b) of the Act providing that Labor Board proceedings "shall, so far as practicable, be conducted in accordance with the rules of evidence * * *."

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short supply for civilian purposes and once lost were extremely difficult to replace;

(4) The existence of wage stabilization, which meant that once a union had been recognized under the National Labor Relations Act an employer could not possibly adjust wages (even to meet then going rates) without War Labor Board approval which in turn depended upon consent of that union in a so-called "Form 10 Application" or participation by that union in a so-called "Dispute Case" (Executive Order 9328 of April 3, 1943);

(5) A business that did not depend either upon large numbers of employees to operate or upon the general public for customers—in other words, a business that was vulnerable to more subtle but far more effective forms of economic coercion than the usual picket-line.

These unusual but very real forces created a situation where the union *without losing a single member and without having a single member lose a day's pay* could strangle the business by "freezing" its wages below the scale of others bidding in the same labor market, by having its members quit petitioner and transfer to competitor shops and by having the competitor shops raid petitioner's customers and salesmen—the union and its members suffering nothing thereby, could well afford to sit by and hope for the extinction of the business.

The *cul de sac* in which petitioner and its remaining employees found themselves resulted from the fact that the union's status as representative could not be challenged successfully before the W. L. B. because it was the policy of that agency not to decide representation questions (*Essential Tool & Die Corp.*, 12 W. L. R. 58; *Montgomery Ward & Co.*, 13 W. L. R. 454; *Joint Statement of Policy by W. L. B. and N. L. R. B.*, 14 N. L. R. viii), but to refer the parties to the N. L. R. B. which, as pointed out in the Court of Appeals opinion, has here denied five separate petitions for a new investigation and certification of representatives. Thus although petitioner challenged the union's authority before the W. L. B. from the outset that challenge was unsuccessful (*Superior Engraving Co.*, 24 W. L. R. 351; 28 W. L. R. 863).

The Board excluded evidence of declarations made by employees when they were quitting petitioner that they were doing so to comply with suggestions of union officials. The Court of Appeals has affirmed that exclusion on the ground that the evidence was hearsay. We contend (a) that declarations of motive at the time an action is taken are a well established exception to the hearsay rule; (b) that the Act, even as amended, does not bar all hearsay; (c) that as to the few employess who testified they left for better paying jobs, this evidence of contrary declarations was admissible as impeachment. The unrealistic rule of the present decision effectively bars real ascertainment of union activity in many situations and is contrary to the public interest.

5. The Court of Appeals opinion on limitations accomplishes the dubious feat of squaring a 360° circle. It concedes that the Board erred in holding that the six months' limitation written into the Act by the 1947 amendments began to run from the effective date of the Act (August 22, 1947) rather than from the date of enactment (June 23, 1947), and that asserted violations set forth in the Board's amendment of February 23, 1948, were barred by the statute. Yet the Court, although holding that there could be no lawful complaint of such violations, permits relief thereon as fully as though a complaint had been issued lawfully.

The Court holds that the Board has jurisdiction to give relief under specific sections of the statute on which it had no authority to issue a complaint. That holding, if permitted to stand, means that the limitations provision of the statute is virtually meaningless. But the holding strikes still deeper, because if "conviction upon a charge not made would be a sheer denial of due process" (*Thornhill* v. *Alabama*, 310 U. S. 88, 96), conviction upon charges

beyond the agency's jurisdiction to make is an even more apparent denial. All restraints, constitutional or statutory, on orderly procedure vanish if an administrative agency is permitted to grant remedies beyond its jurisdiction to issue complaints.

6. Although the matter of estoppel by prior decision is relegated to a footnote (R. 850) in the Court of Appeals decision, it raises a vital question as to finality of administrative agency rulings.

The prior case, No. 13-C-2281, was initiated by the union on November 19, 1943 (R. 115). On July 7, 1944, the union filed an amended charge in that case alleging that petitioner had supported an independent organization until about June, 1943, and from and after that date had "urged, warned and persuaded its employees to cease, refrain from, and renounce their membership and activities in the undersigned union," had questioned employees, and had disparaged the union (R. 117). The hearing did not occur until July 18 to 21, 1944 (61 N. L. R. B. at 40). That is some four months after the constructive refusal to bargain is found here. The Trial Examiner pointed out in that case (61 N. L. R. B. at 44) that the alleged statements of interference and disparagement there involved "were made *after* the union had won a consent election (the same one involved here) and had been designated the exclusive bargaining agent of the respondent's employees"—the same conduct that is the subject of inquiry in the case at bar. On March 27, 1945, the Board handed down a decision in the prior case (with which petitioner promptly and fully complied) ordering posting of notices of disestablishment of the antecedent organization, but finding as to the alleged violations of Section 8(1) that the action be dismissed (R. 119-121). This was said to be because the Trial Examiner in that case had erroneously excluded defense evidence, but

whatever the reasons may have been, the order was not a dismissal without prejudice but was one of complete dismissal after full hearing in an adversary proceeding. The order of dismissal is the form of order required by the statute when the Board is of opinion that no unfair labor practices have been committed (Sec. 10c of the Act originally and as amended).

While there have been rulings (Cf. *Wallace Corporation* v. *N. L. R. B.*, 323 U. S. 248) that transactions in *representation* proceedings do not bar the Board from taking a contrary position in subsequent unfair labor practice proceedings, there has been no decision that the Board in *adversary unfair practice proceedings* may twice litigate the same matter. The Court of Appeals points out here that there was no charge of refusal to bargain in the former case; but that misses the point—what is really found here is a *constructive* refusal to bargain in March, 1944, said to arise from the commission of other unfair practices, and it is as to those asserted practices that we maintain the Board is estopped.

The errors as to limitations and estoppel not only are wrong in and of themselves for legal reasons, but they served to open the record to many hundred pages of stale, unreliable, and uncertain evidence. (1500 pages of evidence had been taken when the amendment was offered (R. 452); 1500 additional pages taken thereafter.) The Trial Examiner commented in the case at bar that, "passage of time often dims recollection and that Busse, Conforti, and others may have in certain instances been merely mistaken in their recollection of evidence" (R. 42). That apology illuminates one of the precise evils which Congress sought to cure. House Report No. 245 on H. R. 3020,

Eightieth Congress, at page 40, in explaining the limitations provisions, said:

> "It has not been unusual for the Board, in the past, to issue its complaints years after an unfair practice was alleged to have occurred, and after records have been destroyed, witnesses have gone elsewhere and recollection of the events in question have become dim and confused."

But by ignoring limitations and refusing to be bound by its prior decision the Board has endeavored to fashion a case out of such condemned vagaries.

Conclusion.

We respectfully urge that this case presents questions of basic importance in the development of sound labor law, in the proper construction of the Labor-Management Relations Act, 1947, and in the impact of the constitutional requirement of due process of law upon the procedures of administrative tribunals. These questions go not only to the relationship that exists between the union as an entity, its members, and the affected employer during normal times, but as to the responsibilities of those parties to each other and to the Government during abnormal times. It would be helpful to settle those questions in this case.

We assume that this petition will be opposed and upon the general ground that it is for the Board and not for the courts to determine what relief will effectuate the purposes of the Act. However, that principle is not without limitations and has never deterred this Court from setting aside orders which perverted rather than effectuated the purposes of the Act (*Southern Steamship Co.* v. *N. L. R. B.*,

316 U. S. 47; *N. L. R. B.* v. *Fansteel Metallurgical Corporation,* 306 U. S. 240).

To say, as does the Board, that employee freedom is effectuated by impressing upon 77 supposedly free citizens a union selected by another group years before, is, we submit, to state an absurdity. Obviously, fixation on administrative dogma and doctrines it seeks to engraft on the statute has blinded the Board to realities and has led it to a cruel result justified neither by the statute nor by the opinions of this Court.

Respectfully submitted,

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December 1, 1950.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Questions presented	2
Statement	3
Argument	14
Conclusion	23
Appendix	24

CITATIONS

Cases:

Allis-Chalmers Mfg. Co., 50 N. L. R. B. 306 ..... 11, 12, 18
American Mutual Liability Ins. Co. v. *Lowe*, 85 F. 2d 625 .. 20
Buckeye Powder Co. v. *DuPont Powder Co.*, 248 U. S. 55 .. 19
Colorado Fuel & Iron Corp. v. *National Labor Relations Board*, 121 F. 2d 165 16
Continental Oil Co. v. *National Labor Relations Board*, 113 F. 2d 473, remanded on other grounds, 313 U. S. 212 ... 16
Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U. S. 134 23
Franks Bros. Co. v. *National Labor Relations Board*, 321 U. S. 702 ..... 15, 18
Great Southern Trucking Co. v. *National Labor Relations Board*, 139 F. 2d 984, certiorari denied, 322 U. S. 729 ... 15
International Association of Machinists v. *National Labor Relations Board*, 311 U. S. 72 15
Joanna Cotton Mills v. *National Labor Relations Board*, 176 F. 2d 749 20
Kennecott Copper Corp., 51 N. L. R. B. 1140 12
Landis Machine Co., 54 N. L. R. B. 1440 12
Lewis v. *Lewis*, 7 How. 776 20
MacClatchie Mfg. Co., 53 N. L. R. B. 1268 12
Medo Photo Supply Corp. v. *National Labor Relations Board*, 321 U. S. 678 15
National Labor Relations Board v. *Andrew Jergens Co.*, 175 F. 2d 130, certiorari denied, 338 U. S. 827 16
National Labor Relations Board v. *Appalachian Electric Power Co.*, 140 F. 2d 217 15
National Labor Relations Board v. *Botany Worsted Mills*, 133 F. 2d 876, certiorari denied, 319 U. S. 751 15
National Labor Relations Board v. *Bradford Dyeing Assn.*, 310 U. S. 318 15

Cases—Continued

	Page
National Labor Relations Board v. *Brozen*, 166 F. 2d 812	15
National Labor Relations Board v. *Central Dispensary & Emergency Hospital*, 145 F. 2d 852, certiorari denied, 324 U. S. 847	15
National Labor Relations Board v. *Century Oxford Mfg. Corp.*, 140 F. 2d 541, certiorari denied, 323 U. S. 714	15
National Labor Relations Board v. *Cheney California Lumber Co.*, 327 U. S. 385	22
National Labor Relations Board v. *Chicago Apparatus Company*, 116 F. 2d 753	15
National Labor Relations Board v. *Gatke Corp.*, 162 F. 2d 252	18
National Labor Relations Board v. *Itasca Cotton Mfg. Co.*, 179 F. 2d 504	20
National Labor Relations Board v. *P. Lorillard Co.*, 314 U. S. 512	15
National Labor Relations Board v. *Norfolk Shipbuilding and Drydock Co.*, 172 F. 2d 813	16
National Labor Relations Board v. *Porcelain Steels, Inc.*, 138 F. 2d 840	16
National Labor Relations Board v. *Prudential Insurance Co.*, 154 F. 2d 385	15
National Labor Relations Board v. *Swift & Co.*, 162 F. 2d 575, certiorari denied, 332 U. S. 791	15
National Labor Relations Board v. *Worcester Woolen Mills Corporation*, 170 F. 2d 13, certiorari denied, 336 U. S. 903	15
National Licorice Co. v. *National Labor Relations Board*, 309 U. S. 350	22
Semi-Steel Casting Co. v. *National Labor Relations Board*, 160 F. 2d 388, certiorari denied, 332 U. S. 758	16
Sohn v. *Waterson*, 17 Wall. 596	20
Southern Pacific R. Co. v. *United States*, 168 U. S. 1	23
United States v. *Morena*, 245 U. S. 392	20
Wallace Corp. v. *National Labor Relations Board*, 323 U. S. 248	23

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. III, 151 *et seq.*):

Section 7	24
Section 8	24
Section 10	14, 19, 20, 25
Section 104	20, 27

Miscellaneous:

National Labor Relations Board, Twelfth Annual Report (1947), p. 54 — 12

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 434

SUPERIOR ENGRAVING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 843–854), as modified on petition for rehearing (R. 856–858), is reported at 183 F. 2d 783. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 63–73) are reported at 83 N. L. R. B. 215.

JURISDICTION

The decree of the court below was entered on September 20, 1950 (R. 861–863). The petition for a writ of certiorari was filed on December 6, 1950. The jurisdiction of this Court is invoked

under Section 10 (e) of the National Labor Relations Act, as amended, and under 28 U. S. C. 1254 (1).

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. III, 151 *et seq.*) are set forth in the Appendix hereto, *infra,* pp. 24–27.

QUESTIONS PRESENTED

1. Whether the Board may require an employer to continue bargaining with a certified union where, during the operative period of the certification, the employer has committed unfair labor practices designed to unseat the union and thereafter refuses to continue bargaining because of an alleged loss of the union's majority status.

2. Whether, where a union was alleged to have resorted to self help, the Board properly applied its policy of extending the life of its certification of the union as the bargaining representative of certain employees to compensate for time during which proceedings were pending before the War Labor Board.

3. Where a labor organization has filed a charge alleging unlawful refusal to bargain in good faith, whether the Board may, on the basis of such charge, properly order the employer to cease and desist from various forms of restraint and interference through which the refusal was accomplished, although these acts, not having been

charged as separate unfair labor practices during the statutory limitation period, could not form the basis for an independent complaint.[1]

STATEMENT

This case arose upon charges by the Chicago Photo-Engravers' Union, No. 5, hereinafter called the Union, that petitioner had violated Sections 8 (1), 8 (2), and 8 (5) of the National Labor Relations Act (R. 13–14, 15–16, 24–26). The background of the case may be summarized as follows:

A. *Background of the case.* On October 11, 1943, the Board conducted an election to determine whether petitioner's employees wished to be represented for collective bargaining purposes by the Union. The Union received twenty-three of the thirty-six valid votes cast, and was certified as the exclusive bargaining representative of the employees in the appropriate unit (R. 35; 84).[2]

Following the election, petitioner and the Union discussed a contract proposed by the Union. After reaching tentative agreement on various items, an impasse was reached (R. 35–36; 84–85). Immediately after the failure to agree, the Union filed charges with the Board alleging unfair labor

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[1] Petitioner's questions numbered 1 and 5 (Pet., pp. 4, 5) rest on assumptions as to facts, which, as we show below (*infra*, pp. 17, 22–23), the record does not warrant. We believe, therefore, that these questions are not properly presented.

[2] In this statement, record references which precede the semicolon are to the Board findings, while those following the semicolon are to the supporting evidence.

practices under Sections 8 (1) and 8 (3) of the Act (R. 115–118). In so far as those charges are pertinent to the present case, they were disposed of by the Board in a decision dated March 27, 1945, dismissing the complaint, without making any findings on the merits, on the ground that the trial examiner had ruled erroneously in excluding evidence (R. 119–121).

After an attempt at conciliation, the disputed issues were on March 9, 1944, certified to the National War Labor Board. On October 18, 1945, the National War Labor Board issued an order requiring, among other things, that the parties enter into a contract containing a union security clause, but refusing to pass upon the issue raised at the outset of that proceeding as to whether the Union continued to represent a majority of the employees (R. 36; 85–87).

On November 10, 1945, the union submitted to petitioner a proposed contract incorporating those matters upon which agreement had been reached in 1943, together with those matters upon which the National War Labor Board had ruled. Petitioner did not reply to this proposal and admittedly has continuously refused to bargain with the Union since that date (R. 20, 36; 87).

B. *Proceedings before the Board.* The Union filed its initial charges on January 28, 1946 (R. 13), and amended them first on August 12, 1947 (R. 15), and again during the hearings before the trial examiner on February 13, 1948 (R. 24–

26). In substance, the amended charges, which are still in issue,[3] are as follows:

1. Refusal to meet in collective bargaining conferences.

2. The granting of unilateral wage increases without consultation with the Union.

3. Dominating and interfering in the formation and administration of Photo-Engravers' Association, a labor organization.

4. Questioning employees concerning their union memberships and the affiliations of other employees, and promising benefits to those who did not join the Union.

These charges served as the basis of a complaint issued on August 13, 1947 (R. 16–19), and amended in February 1948 during the hearings (R. 27–28, 34).

The answer (R. 19–32) and amended answer (R. 29–31) of the petitioner may be summarized as follows:

1. Petitioner admitted its refusal to bargain, but justified its actions on the ground that (a) the Union had ceased to represent the employees because of the withdrawal of its members from the employment of the petitioner and (b) had attempted to coerce the petitioner through various activities.

[3] The Union also charged that petitioner improperly discharged a certain employee because of membership in the Union. The court below was not asked to review the Board's dismissal of this charge.

2. It admitted the unilateral raises and justified them on the ground that the Union had ceased to represent the employees.

3. It denied its domination and interference with Photo-Engravers' Association.

4. It denied interrogating the employees.

Hearings were held before a trial examiner; an intermediate report was issued on May 28, 1948 (R. 32–54); exceptions were filed to this report (R. 56–62); and the Board issued its decision and order on April 28, 1949.

C. *Findings, conclusions, and order of the Board.*

1. *The Board's findings.* Since there was no issue of fact as to whether the petitioner had refused to bargain or had granted the unilateral wage increases, the evidence and the findings on these issues related primarily to the question of whether the facts justified the petitioner in these actions.

The Board found that although approximately 20 employees left their employment between December 1943 and June 1944, there was no evidence that they did so at the direction of the Union (R. 46, 68). The employees who were called as witnesses testified that they left for better-paying jobs or were called to military service (R. 46; 297, 517, 353, 381, 365–366, 356, 339). The Board upheld the trial examiner in refusing to accept testimony by petitioner's president that nine employees had told him that they

were instructed to quit, on the ground that such testimony was hearsay with respect to the issue as to whether the Union had issued such instructions (R. 68).

With respect to the petitioner's assertion that the Union had engaged in self-help by instructing its members to engage in a slowdown, there was a conflict of evidence which the Board resolved by accepting the testimony that the Union had issued no such instructions (R. 44, 45, 68–69). The Board also found that there was no concerted refusal to work overtime (R. 69). However, the Board did accept the evidence that the Union's president had in December 1943 written to various competing companies in Chicago suggesting that they solicit accounts served by petitioner, and that they attempt to secure the services of two of petitioner's salesmen (R. 69).

With respect to the charges concerning petitioner's encouragement and interference with Photo-Engravers' Association and its attempt to discredit the Union with its employees, the evidence and the findings of the Board make it abundantly clear that the formation and activities of Photo-Engravers' Association were motivated and controlled by the petitioner in an attempt to avoid the necessity of dealing with the Union which had been certified as the representative of its employees under the procedures provided by the Act (R. 63–66). Shortly after the certification of the Union on October 13, 1943, Conforti,

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petitioner's president, persuaded one of his employees, Joseph Busse, to become his agent in forming an inside organization at the plant (R. 37–38, 64; 405, 406–407, 410, 412). Conforti assured Busse that he had a "lifetime job with petitioner" and told him and other employees that if they did not join the Union, he "could do as much and more for them than the union could do and that by not joining the union they would save paying union dues" (R. 37, 64; 405, 406–407). Busse was interrogated by Conforti as to which employees were Union members (R. 38, 64; 406–407). The first direct attempt to displace the Union was through a form of petition which Conforti gave Busse in March 1944, in order that he might collect signatures of employees. The petition stated that the employees no longer desired the Union to represent them, but they wished to negotiate with petitioner directly or through a committee of employees (R. 38, 64; 412–414). Busse did circulate the petition and obtained twenty-seven signatures (R. 38–39, 64; 91, 414–415). This petition was used as the basis for a petition which the Company filed with the National Labor Relations Board on July 14, 1944, requesting the Board to determine whether the Union or an employee committee represented the employees (R. 39; 85). This petition was dismissed (R. 37; 85).

Immediately thereafter Conforti told Busse that he would not sign a contract with the Union

(R. 38; 418–419), and suggested that Busse "get the boys together in a real band" and obtain an attorney (R. 39; 418–419). At Conforti's instigation, Busse first got together with a group of five employees (R. 39; 422–423) and then called a general meeting (R. 39–40; 423–426). At Conforti's suggestion, Busse had a notice of this meeting typed by one of petitioner's employees and posted it at the time clock in the plant (R. 40; 428). Busse reported the results of the meetings to Conforti (R. 40; 425, 431). Conforti suggested that the new organization retain a certain lawyer, which they did (R. 40; 435, 438). With Conforti's permission and without cost to the association, a demand for recognition of the new organization, as well as other documents, were photostated at petitioner's plant (R. 41; 423).

Conforti admitted that he had bought Busse a suit and a hat at a cost of over eighty dollars (R. 41, 65; 708), and said that he had given him war bonds of a cash value of five hundred dollars (R. 42, 85; 739–740). Although there was conflicting testimony as to the purposes of these gifts, the Board accepted Busse's testimony that they were rewards to him for remaining in petitioner's employ and for not joining the Union (R. 42, 65; 502–503).

At the instigation of the petitioner, the new association filed three successive petitions for certification, the first on October 31, 1944, the second

on February 28, 1945, and the third in September 1945 (R. 37; 41, 65, 83–85). Conforti participated actively in these matters (R. 65; 478). All three of these petitions were dismissed (R. 37; 85, 87). The petitioner itself filed two petitions, the first asking the Board whether the Union represented the employees and the second asking the Board to decertify the Union. Both of these petitions were denied (R. 37; 87).

2. *The Board's conclusions.* The Board found that petitioner dominated and interfered with the Photo-Engravers' Association and contributed support to it, in violation of Section 8 (1) and (2) of the Act. It also found that petitioner violated Section 8 (1) by interrogating Busse concerning membership in the Union and by promising benefits to employees if they would refrain from joining the Union (R. 63–66). The Board found that the Union had been the exclusive bargaining representative of petitioner's employees since October 18, 1943.

The Board further found that petitioner by sponsoring and encouraging a disavowal of the Union by its employees; by forming a rival organization in August 1944, in an effort to undermine the Union and thereby eliminate its obligation to bargain with the Union; and by participating in the affairs of the new union, in violation of Section 8 (1) and (2) of the Act, manifested a lack of good faith in its dealings with the Union as early as March 1944, or approximately six

months after the Board had certified the Union as the bargaining representative of petitioner's employees. Accordingly, the Board found that petitioner had, beginning in March 1944, refused to bargain in good faith with the Union, in violation of Section 8 (1) and (5) of the Act. The Board held that any alleged diminution in the Union's majority status did not constitute a defense to petitioner's refusal to bargain with the Union. Having committed unfair labor practices during the first year of the Union's certification when normally under Board rules the bargaining representative's majority status is not open to challenge, petitioner, the Board held, was precluded from attributing the Union's alleged loss of majority to the Union's own action; under such circumstances the Union's alleged loss of majority is conclusively presumed to be due to petitioner's unfair labor practices (R. 66–67).

As an alternative ground for its decision, the Board found that even if petitioner had not engaged in the unfair labor practices demonstrating its lack of good faith in bargaining with the Union, petitioner's refusal to bargain with the Union at the conclusion of the War Labor Board proceedings was violative of Section 8 (1) and (5) of the Act, under the Board's *Allis-Chalmers* rule. Under that rule, in order that a union might not be penalized for resorting to the orderly procedures of the War Labor Board, the Board in computing the one year period during which

the majority status of a bargaining representative is immune to challenge, disregards whatever time is consumed in the War Labor Board proceedings.[4] Therefore at the conclusion of the War Labor Board proceedings in the instant case, the Union was entitled to recognition as the exclusive bargaining agent of petitioner's employees for approximately seven more months. In this connection the Board rejected petitioner's contention that the *Allis-Chalmers* rule should not be applied because the Union or its membership had resorted to self help in the form of mass withdrawal of the Union's members from petitioner's employ, slow down, refusal to work overtime and incitement of petitioner's competitors to solicit the business of its customers. The Board found the first three of these claims unsupported by the record and the last too insignificant a form of self-help to preclude application of the *Allis-Chalmers* rule. (67–69)

Finally, the Board found that petitioner's unilateral wage increases to its employees, without first consulting their bargaining representative, the Union, were also violative of Section 8 (1) and (5) of the Act.

3. *The Board's order.* The Board ordered petitioner to cease and desist from refusing to

[4] *Allis-Chalmers Mfg. Co.*, 50 N. L. R. B. 306. See also *MacClatchie Mfg. Co.*, 53 N. L. R. B. 1268; *Kennecott Copper Corp.*, 51 N. L. R. B. 1140; *Landis Machine Co.*, 54 N. L. R. B. 1440; National Labor Relations Board, Twelfth Annual Report (1947) p. 54.

bargain collectively with the Union; dominating or interfering with the formation of, or contributing support to Photo-Engravers' Association, any successor thereto, or any other labor organization of its employees; recognizing the Association or any successor thereto, as the representative of any of its employees for collective bargaining purposes; offering or giving gifts to any of its employees in order to influence their choice of bargaining representative; and in any other manner interfering with, restraining or coercing its employees in the exercise of their rights under the Act. The order also requires petitioner to bargain collectively, upon request, with the Union; disestablish the Association and to post appropriate notices (R. 70–72).

D. *The proceedings in the Court of Appeals.* In June 1949, petitioner filed in the court below its petition to review and set aside the order of the Board (R. 1–8). The Board thereafter filed its answer to the petition and request for enforcement of its order (R. 8–12). On June 27, 1950, the court below handed down its opinion (R. 843–854), and on August 31, 1950, its opinion on rehearing, with modification of its original opinion (R. 856–858, 859–860), and on September 20, 1950, entered its decree (R. 861–863) enforcing the Board's order in full.

The court's opinion sustained the Board's findings in general and affirmed its order even though the court differed from the Board on several

questions of law. The most important of these differences related to the correct application of Section 10 (b) of the Labor-Management Relations Act of 1947, 61 Stat. 146, 29 U. S. C. 160 (b), which provides that a complaint must be based on charges made within six months of the occurrence of the acts complained of. The Board contended that this limitation permitted charges within the first six months after the effective date of the amendment without regard to the date of the acts complained of (R. 847). The court disagreed with this position and held that the charges concerning interference with the Union and interrogation of the employees were barred by the limitation, since they were not proved to have continued to within six months of the date of the charges. However, the court also held that findings with respect to domination over and interference with the Association were still relevant in support of the charges that the petitioner had refused to bargain with the Union, and that that matter was therefore properly before the Board (R. 847).

ARGUMENT

1. It has been uniformly held that a collective bargaining relationship once rightfully established by a Board certification must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed and that, therefore, during such period, a certified union's status may not be deemed affected

by loss of majority adherence due to defections from the union or turnover in personnel.[5] This Court, as well as the courts of appeals, has held that if, during that period, the employer engages in unfair labor practices designed to unseat the employees' bargaining representative, he may not, even after expiration of the period, refuse to bargain on the ground that the representative has lost its majority status.[6] In such cases the Board may properly order the employer to continue bargaining with the union for a reasonable

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[5] *National Labor Relations Board* v. *Century Oxford Manufacturing Corporation*, 140 F. 2d 541, 542–543 (C. A. 2), certiorari denied, 323 U. S. 714; *National Labor Relations Board* v. *Botany Worsted Mills*, 133 F. 2d 876, 881–882 (C. A. 3), certiorari denied, 319 U. S. 751; *National Labor Relations Board* v. *Appalachian Electric Power Co.*, 140 F. 2d 217, 221–222 (C. A. 4); *National Labor Relations Board* v. *Worcester Woolen Mills Corporation*, 170 F. 2d 13 (C. A. 1), certiorari denied, 336 U. S. 903; *National Labor Relations Board* v. *Prudential Insurance Co.*, 154 F. 2d 385, 389 (C. A. 6); *National Labor Relations Board* v. *Brozen*, 166 F. 2d 812 (C. A. 2); *National Labor Relations Board* v. *Swift & Co.*, 162 F. 2d 575, 582–584 (C. A. 3), certiorari denied, 332 U. S. 791; *National Labor Relations Board* v. *Central Dispensary & Emergency Hospital*, 145 F. 2d 852, 854–855 (C. A. D. C.), certiorari denied, 324 U. S. 847.

[6] In addition to cases cited in n. 5, *supra*, *Franks Bros. Company* v. *National Labor Relations Board*, 321 U. S. 702; *National Labor Relations Board* v. *P. Lorillard Co.*, 314 U. S. 512; *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72; *National Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318; *Medo Photo Supply Corporation* v. *National Labor Relations Board*, 321 U. S. 678; *National Labor Relations Board* v. *Chicago Apparatus Company*, 116 F. 2d 753, 758 (C. A. 7); *Great Southern Trucking Co.* v. *National Labor Relations*

period after the effects of the unfair labor practices have been dissipated. The Board may issue such a remedial order whether the alleged loss of majority occurs either prior to or after commission of the unfair labor practices, for, in the one case, the employer's action tends to bar the union from reacquiring its majority status during the period it is entitled to recognition, and in the other the employer's action directly tends to destroy the majority status of the union. In either case, a bargaining order is necessary to prevent the employer from taking advantage of his own wrongdoing. These settled principles afford ample warrant for the Board's bargaining order in the instant case, which is based upon petitioner's conduct in seeking by unfair labor practices to unseat the Union and refusing to bargain in good faith, beginning only about five months after the Union had been certified as the employees' bargaining representative.

Petitioner asserts (Pet. pp. 7–13) that these

Board, 139 F. 2d 984, 985, 987 (C. A. 4) certiorari denied, 322 U. S. 729; *National Labor Relations Board* v. *Norfolk Shipbuilding and Drydock Co.*, 172 F. 2d 813, 816 (C. A. 4); *National Labor Relations Board* v. *Porcelain Steels, Inc.*, 138 F. 2d 840 (C. A. 6); *Semi-Steel Casting Co.* v. *National Labor Relations Board*, 160 F. 2d 388, 392 (C. A. 8), certiorari denied, 332 U. S. 758; *National Labor Relations Board* v. *Andrew Jergens Co.*, 175 F. 2d 130, 134–135 (C. A. 9), certiorari denied, 338 U. S. 827; *Colorado Fuel & Iron Corp.* v. *National Labor Relations Board*, 121 F. 2d 165, 176 (C. A. 10); *Continental Oil Co.* v. *National Labor Relations Board*, 113 F. 2d 473, 480 (C. A. 10), remanded on other grounds, 313 U. S. 212.

principles have no application here because, it argues, by the "mass" withdrawal of 19 union members (including the three called to military service) from petitioner's employ, prior to the commission of any unfair labor practices, the Union itself destroyed its majority.

This contention equates the individual action of the union members in quitting their jobs with action by the Union, despite the fact, that, as the Board found (R. 68), no probative evidence was introduced to show that the Union directed or ordered its members to quit, or that the members even acted in concert. The record discloses merely that over a period of four months, 16 employees left petitioner, those who testified stating that they did so to obtain better paying jobs. Personnel turnover which, as here, is attributable to employee dissatisfatcion with working conditions, can not affect the representative status of a certified bargaining representative during the life of its certification. See cases, *supra,* note 5. Since the record discloses no such "mass" quitting as could be considered "concerted activity," petitioner's question numbered 1 is not presented by this record.

2. Petitioner asserts (Pet., pp. 13–15) that the Union's resort to "self-help" [7] precluded the appli-

[7] In view of the Board's findings, the only incident which could possibly be characterized as "self-help" in this context is the letter written by the Union months before the disputed issues were submitted to the War Labor Board urging petitioner's competitors to solicit its accounts (*supra*, p. 7).

cation of the *Allis-Chalmers* rule to the instant case. It should be noted that the Board relied on the *Allis-Chalmers* rule only as an alternative basis for its decision. Petitioner does not challenge the validity of the rule, but only its application. Even its application is not determinative of the case unless the alternate ground for decision is overruled.

The Board's conclusion that the alleged "self-help" resorted to by the Union in the heat of resentment over petitioner's bargaining tactics, but months before the parties turned to the War Labor Board, was too insignificant to preclude application of the *Allis-Chalmers* rule—a conclusion which the court below sustained—is, in the circumstances of this case, neither arbitrary nor capricious. The rule itself represents a proper exercise of the Board's authority to establish appropriate standards designed to permit "a bargaining relationship once rightfully established * * * to exist and function for a reasonable period in which it can be given a fair chance to succeed" (*Franks Bros. Co.* v. *National Labor Relations Board,* 321 U. S. 702, 705). *National Labor Relations Board* v. *Gatke Corp.,* 162 F. 2d 252 (C. A. 7). Absent any abuse of discretion, and none is shown, application of a valid doctrine to a peculiar and non-representative fact situation such as this, does not present a question of sufficient importance to warrant review.

3. Petitioner's contention (Pet., pp. 15–16), that the Board erred in excluding as hearsay the testimony of Conforti that a number of employees informed him they were quitting in compliance with the suggestions of union officials, is without merit. The evidence was offered to prove that the Union had directed its members to quit petitioner's employ and not, as petitioner now urges, to establish the employees' motives (R. 183–184). In that posture the evidence was clearly hearsay and the Board's action in excluding it wholly proper, as the court below held (*Buckeye Powder Co.* v. *DuPont Powder Co.*, 248 U. S. 55, 65), particularly in view of the evidentiary requirements of the amended Act.[8]

4. Petitioner asserts (Pet., pp. 16–17) that the court below erred in enforcing the Board's order since the order is essentially based upon unfair labor practices which occurred in 1943–1945, more than six months prior to the filing of the Union's second amended charge, and that the Board was

[8] Section 10 (b) of the amended Act provides that unfair labor practice proceedings before the Board "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723–B, 723–C)." The hearing in the instant case was held after the effective date of the amended Act. The foregoing provision of the amended Act was therefore applicable to these proceedings.

precluded by Section 10 (b) of the statute [9] from issuing a complaint thereon. The Board held that Section 10 (b) did not foreclose consideration of the second amended charge because it had been filed on February 13, 1948, or within six months after the effective date of the amended Act (August 22, 1947) (R. 34, 63). The Board's conclusion that charges filed within six months after the effective date of the Act are timely, was based upon the rule that if a statute creates a period of limitation where none theretofore existed,[10] preexisting claims will be subject to the newly created period of limitations, but that on such claims the time will begin to run on the effective date of the new statute.[11]

The court below, differing with the Board, concluded that the time for filing preexisting claims expired sixty days after enactment of the new statute, on its effective date.[12] Since the second

[9] Section 10 (b) of the amended Act provides in part, "That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board * * *".

[10] The original Act prescribed no period of limitation for the filing of charges.

[11] *United States* v. *Morena*, 245 U. S. 392; *Sohn* v. *Waterson*, 17 Wall. 596, 599–600; *Lewis* v. *Lewis*, 7 How. 776, 778–779; *American Mutual Liability Ins. Co.* v. *Lowe*, 85 F. 2d 625, 627 (C. A. 3); *Joanna Cotton Mills* v. *National Labor Relations Board*, 176 F. 2d 749 (C. A. 4); *National Labor Relations Board* v. *Itasca Cotton Mfg. Co.*, 179 F. 2d 504 (C. A. 5).

[12] Section 104 of the amended Act provided that the amendments "shall take effect sixty days after the enactment of this Act * * *."

amended charges were filed thereafter and recited violations which occurred more than six months previously, the court held that insofar as the Board's complaint was based upon such allegations, the complaint was defective (R. 847–848). That part of the second amended charge which fell within this category was the allegation that petitioner, since on or about October 1943, had engaged in illegal activities with respect to Photo-Engravers' Association and had interrogated the employees concerning union activities and promised them rewards for staying out of the Union in violation of Section 8 (1) and (2) of the Act (*supra,* p. 5). The court below left undisturbed, however, that part of the charge which alleged that petitioner had failed and refused to bargain collectively with the Union, in violation of Section 8 (1) and (5) of the Act, since that unfair practice had been charged prior to enactment of the amended Act. The court below concluded that although the Board could not make petitioner's role in the formation of the Association or its illegal interference with the employees' rights the subject of a complaint alleging violations of Section 8 (1) or (2) of the Act, nevertheless the evidence relating to these unfair labor practices was germane to the issue of petitioner's good faith in its dealings with the Union and therefore was properly before the Board in support of the timely allegation that petitioner had failed to bargain collectively in

good faith with the Union, in violation of Section 8 (1) and (5) of the Act. Upon this basis, the court below properly upheld the Board's entire order as appropriately dealing with all the unfair labor practices related to the timely charge. *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350, 369.

Accordingly, the Board's order is valid, whether the interpretation of Section 10 (b) adopted by the Board or by the court below is correct.

5. Petitioner asserts (Pet. pp. 17–19) that the Board was estopped from proceeding in the instant case because in a prior proceeding (identified as Case No. 13–C–2281 on the Board's records) the Board had dismissed a complaint against petitioner allegedly involving the same conduct (*supra,* pp. 3–4). Petitioner did not urge this objection before the Board (R. 56–62) and therefore has no standing to urge it here. *National Labor Relations Board* v. *Cheney California Lumber Co.,* 327 U. S. 385, 388.

In any event, the contention has no basis in the record. A comparison of the charges in the two cases (R. 25, 117) discloses that they relate to different acts both in point of time and kind. As the court below observed (R. 850), only the allegation concerning interrogation of employees by petitioner is common to both cases. Moreover, the Board in the prior proceeding made no "final adjudication" in favor of petitioner. It dismissed the complaint because in the "state of the record" it "was unable to make any findings

in respect to the allegations in question" (R. 120). In these circumstances, the doctrine of *res judicata* or estoppel, even if held to apply to Board proceedings,[13] can, by definition, have no application here. See *Southern Pacific R. Co.* v. *United States,* 168 U. S. 1, 48–49. Accordingly, petitioner's question numbered 5 is not presented on this record.

CONCLUSION

The result reached by the court below, sustaining the Board's findings and order, is correct and presents neither a conflict with other decisions nor any substantial question warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1951.

[13] See *Wallace Corp.* v. *National Labor Relations Board,* 323 U. S. 248, 253; *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U. S. 134, 142–146.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. III, Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from

permitting employees to confer with him during working hours without loss of time or pay;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor pratice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period

shall be computed from the day of his discharge. * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has

not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

* * * * *

SEC. 104. The amendments made by this title shall take effect sixty days after the date of the enactment of this Act, except that the authority of the President to appoint certain officers conferred upon him by section 3 of the National Labor Relations Act as amended by this title may be exercised forthwith.

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